

## **CCWG-Accountability Expert Assessment**

### *Executive Summary*

**May 19, 2016**

On March 14, 2014, the National Telecommunications & Information Administration of the United States Department of Commerce (NTIA) announced its intent to transition its stewardship of key Internet domain name functions to the global multistakeholder community. To meet the NTIA's requirements for the transition, the Internet Corporation for Assigned Names and Numbers (ICANN) facilitated the formation of multiple working groups, each focused on a different element of the transition proposal. One of those groups was the Cross-Community Working Group on Accountability (CCWG), which developed a set of 12 recommendations for strengthening and enhancing ICANN's accountability. As contribution to its own review of the transition proposal, the NTIA has convened this independent expert panel with a single objective: to conduct a thorough review and assessment of the CCWG Recommendations in order to determine the extent to which they comply with good governance principles.

Because ICANN is such a unique entity, sharing similarities with for-profit and nonprofit corporations, as well as multistakeholder entities, the expert panel drew on a diverse array of expertise. Utilizing recognized governance frameworks and leading scholarship from across the fields of corporate, nonprofit, and multistakeholder governance, the expert panel identified a set of good governance principles common to these varied fields and applicable to ICANN and the Internet governance ecosystem. These principles cluster around five broad categories:

1. Mission and duties
2. Auditing and transparency
3. Deliberative frameworks
4. Checks and balances
5. Enforcement capacity

For each of these categories, the expert panel determined if and how specific CCWG Recommendations collectively and individually supported the underlying principles. The expert panel then assessed the CCWG Recommendations as a whole, using as a lens an analysis of how the CCWG Recommendations, when operating in concert, could mitigate the risk of government or third-party subversion of ICANN.

Based on this detailed and careful assessment, the expert panel concludes that the CCWG Recommendations are consistent with sound principles of good governance. ICANN has a unique and important mission within the Internet ecosystem, and the recommendations of the CCWG reflect that. The recommendations are designed to enhance the accountability of the organization, while preserving the decentralized and multistakeholder nature of Internet governance. While these recommendations might not be well-suited for companies that prioritize efficiency and profits, or pursue a singular mission on behalf of a single, well-defined constituency, they are well-matched to the special needs and role of ICANN.

## CCWG-Accountability Expert Assessment

*Assessment*  
May 19, 2016

### I. Background and History of the CCWG-Accountability Recommendations

On March 14, 2014, the National Telecommunications & Information Administration of the United States Department of Commerce (NTIA) announced its intent to transition its stewardship of key Internet domain name functions to the global multistakeholder community.<sup>1</sup> To enable this transition, the NTIA asked the Internet Corporation of Assigned Names and Numbers (ICANN) to convene a multistakeholder process that would develop a transition plan meeting four criteria:

1. Support and enhance the multistakeholder model.
2. Maintain the security, stability, and resiliency of the Internet domain name system.
3. Meet the needs and expectations of the global customers and partners of the IANA services.
4. Maintain the openness of the Internet.

Additionally, the NTIA stated it would not accept a proposal that would replace the NTIA with a government-led alternative.

In order to ensure that these criteria were met, ICANN facilitated the formation of several working groups, each focused on a different element of the transition proposal. For example, ICANN and the stakeholder community convened the IANA Stewardship Transition Coordination Working Group (ICG) to consider technical components of the transition. The focus of this assessment is the Cross-Community Working Group on Accountability (CCWG). After months of meetings, legal guidance, public deliberations, and debate, the CCWG developed a set of 12 recommendations for strengthening and enhancing ICANN's accountability (CCWG Recommendations). The centerpiece of these recommendations is the creation of an "Empowered Community" that will have seven significant powers that can be exercised under extraordinary circumstances, such as if ICANN strays from its mission or is subverted by outside interests. These powers include rejecting ICANN budgets, removing individual ICANN board members, removing the entire ICANN board, and initiating binding arbitration to compel action consistent with the mission. On March 10, 2016, ICANN's board formally presented the CCWG Recommendations to the NTIA. Additionally, on April 21, 2016, ICANN posted for public comment the bylaw amendments that would effectuate the CCWG Recommendations.<sup>2</sup>

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<sup>1</sup> The IANA functions are a set of interdependent technical functions that enable the continued efficient operation of the Internet. They include: (1) the coordination of the assignment of technical Internet protocol parameters; (2) the administration of certain responsibilities associated with DNS root zone management; (3) the allocation of Internet numbering resources; and, (4) other services related to the management of the .ARPA and .INT top-level domains. ICANN currently performs these functions through a contract with NTIA.

<sup>2</sup> The expert panel was not asked to, and did not perform an overall review of the proposed bylaw amendments because the public comment and review period is still ongoing as of transmission of this assessment. We do observe that the lawyers for the CCWG have stated that they believe that the proposed draft bylaws are consistent with the

The question currently before the NTIA is whether these recommendations, when fully implemented, will preserve the flexible, multistakeholder system that has enabled the Internet to become a powerful force for economic and social change, while assuring the long-term stability of this critical infrastructure. As part of its own review, the NTIA is evaluating the IANA Stewardship Transition proposal and make a determination as to whether those recommendations meet the four criteria and prevent the installation of a government-led alternative system.

The assessment of this expert panel has a far narrower and more specific scope. The NTIA has convened this independent expert panel with a single objective: to conduct a thorough review and assessment of the CCWG Recommendations in order to determine the extent to which they comply with good governance principles. This expert assessment will supplement the NTIA's expertise, and serve as an expert input to its larger review. By the same token, it is important to understand what this assessment is not. The expert panel did not undertake an exhaustive accountability review of ICANN, under either its current or post-transition structure.<sup>3</sup> The expert panel did not assess the accountability of the broader Internet governance ecosystem.<sup>4</sup> The expert panel did not consider every possible scenario in which ICANN's accountability mechanisms could fail or be subverted.<sup>5</sup> And the expert panel did not review the ICG's transition proposals, nor does it opine on the ultimate question of the providence of the proposed IANA transition. Such questions are entrusted to those entities, such as the NTIA, in the best position to provide answers.

Assessing whether the CCWG Recommendations conform to good governance practices presents a challenge because ICANN is such a unique entity, without an appropriate analogue. It is organized as a nonprofit and serves many public-oriented goals, yet its operations have an incredible impact on the global for-profit economy. It is also a multistakeholder organization, with diverse constituencies that shape its course and operations in ways that would be unfamiliar for most corporations, for-profit and not. As such, while ICANN shares many similarities with other for-profit and nonprofit corporations, it simultaneously fails to fit neatly into the governance frameworks designed for those entities. And multistakeholder governance as a field does not yet have the established set of consensus best practice governance frameworks that exist

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CCWG Recommendations. See E-mail from Holly Gregory to the CCWG-Accountability Mailing List, *Draft ICANN Bylaws Draft of April 20, 2016: CCWG=Accountability and CWG-Stewardship Certifications* (Apr. 20, 2016), available at <http://mm.icann.org/pipermail/accountability-cross-community/2016-April/012063.html>.

<sup>3</sup> One member of the expert panel, the Berkman Center for Internet & Society, led such an exercise as part of ICANN's 2010 Accountability and Transparency Review. Such an effort takes several months, teams of people, and hundreds of thousands of dollars – none of which were available for this assessment.

<sup>4</sup> At issue before the NTIA is solely the question of the IANA transition. The Internet is far more than just ICANN and the IANA functions, comprised of a complex network of independent servers, autonomous systems, registries, registrars, and a multitude of multistakeholder organizations, whose collective voluntary commitment to using a shared and open set of protocols enables the Internet to function and evolve. The transition of the IANA functions, while significant, is but one small part of that larger ecosystem. Neither the NTIA, nor this expert panel, will assess these larger issues.

<sup>5</sup> The CCWG, in a series of stress tests, considered 37 possible failure scenarios, including attempts by governments to subvert ICANN. See CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Feb. 23, 2016, at Annex 15 [hereinafter individual annexes are referenced as "Annex" followed by the specific Annex number]. The expert panel considered the risk of government subversion due to its salience in the public debate. See *infra* Part III.

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in the fields of corporate and nonprofit governance. For that reason, this assessment necessarily draws from a diversity of perspectives across corporate, nonprofit, and multistakeholder governance. This panel represents this array of expertise:

- John C. Coffee, Jr.: The Adolf A. Berle Professor of Law at Columbia Law School—a recognized expert in corporate governance and a Reporter for the American Law Institute’s *Principles of Corporate Governance*.
- Dana Brakman Reiser: Professor of Law at Brooklyn Law School—A recognized expert in the law of nonprofit organizations who has written extensively on nonprofit governance and the role of non-fiduciary constituencies in nonprofit organizations.
- The Berkman Center for Internet & Society at Harvard University: Professor Urs Gasser, the Center’s Executive Director and Professor of Practice at Harvard Law School, and Senior Researcher Ryan Budish have led extensive research into several important aspects of the multi-layered system that defines the function, structure, and operation of the Internet, including developing a better understanding of the mechanisms of effective governance.

In the absence of established, consensus best governance practices for entities like ICANN, the expert panel has determined that this assessment necessitates synthesizing a framework of good governance practices tailored to the unique needs of the multistakeholder Internet community. To create such a framework, the expert panel adopted a triangulation approach that draws from recognized governance frameworks and leading scholarship from across the fields of corporate, nonprofit, and multistakeholder governance. As an initial step in the triangulation, the panel, utilizing their diverse expertise, identified and reviewed a representative collection of foundational scholarship and frameworks from each of their fields.<sup>6</sup> From that foundational material, the expert panel identified a set of 22 higher-order good governance principles common to these varied fields and applicable to ICANN and the Internet governance ecosystem. These principles, described in greater detail below, are clustered into five broad categories:

1. Mission and duties
2. Auditing and transparency
3. Deliberative frameworks
4. Checks and balances
5. Enforcement capacity

The remainder of this assessment begins by describing the good governance framework that the expert panel synthesized. The expert panel first considers each of these categories of good governance principles, describing the key elements of the framework and then identifying how specific CCWG Recommendations collectively and individually support those principles. The expert panel next considers the CCWG Recommendations as a whole, to determine whether the proposed accountability reforms are generally consistent with the good governance framework. From this broad perspective, the expert panel offers several general observations about the CCWG Recommendations, including an assessment of the risk of government subversion of ICANN.

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<sup>6</sup> See Appendix 1.

As described more fully below, the expert panel ultimately concludes that the CCWG Recommendations are consistent with sound principles of good governance. ICANN has a unique and important mission within the Internet ecosystem, and the recommendations of the CCWG reflect that. The recommendations are designed to enhance the accountability of the organization, while preserving the decentralized and multistakeholder nature of Internet governance. While these recommendations might not be well-suited for companies that prioritize efficiency and profits or pursue a singular mission on behalf of a single, well-defined constituency, they are well-matched to the special needs and role of ICANN.

## **II. Governance Principles and the CCWG Recommendations**

The expert panel's best governance framework includes five broad categories encompassing numerous specific good governance principles. No single principle in this framework would be sufficient to assure an organization's accountability, nor is total adherence to every principle a necessary requirement. Instead, the expert panel's framework operates from the assumption that these principles represent a constellation of responsibilities, duties, and tools that, when activated, operate in concert to create a system of good governance. Accordingly, this assessment first describes in greater detail the five broad categories of good governance principles, and then for each category describes how the CCWG Recommendations, individually and collectively, reflect these good governance principles. Part III of this assessment will look more broadly at the entirety of the CCWG Recommendations to provide an overall assessment.

### **A. Mission & Duties**

#### **a. Framework Overview**

The responsibility and competence of an organization's key actors will, in large part, determine the quality of its governance. But even the most dedicated and capable actors need clear guidance to steward their organizations. To assist the individuals and bodies entrusted to manage an organization, good governance systems provide clear guidance on what they should and should not do.

This guidance begins with defining the organizational mission and enumerating the powers and responsibilities of each set of actors with a governance role. A clear organizational mission sets the ultimate criteria against which all organizational actions must be measured. Establishing organizational mission can be especially challenging in nonprofit organizations, for whom profitability cannot serve as an easy proxy for success, and in multistakeholder organizations, whose multiple constituencies can disagree over the organization's proper purposes and the priority among them. Despite this difficulty, organizations must identify their mission in order to establish a high-quality governance system. Identifying the roles and processes by which organizational actions will be taken is likewise crucial. Doing so allows for orderly decision-making, and supports the related good governance principles of transparency and deliberation.

Good governance systems also establish expectations and constraints that limit key actors' ability to undermine or oppose the best interests of an organization and its stakeholders. Under both for-profit and nonprofit corporate law, fiduciary duties of care and loyalty serve these functions. They create expectations that directors and officers will act with the level of care a reasonably prudent person would apply in similar circumstances, will not elevate their personal interests over those of their organizations, and will act always in good faith. While best governance practices for multistakeholder organizations are not yet as conclusively established as those enshrined in for-profit and nonprofit corporate law, key actors in these organizations are certainly expected to represent their stakeholder groups faithfully. Good governance systems will identify these obligations, along with the overarching requirement of supporting the organizational mission. In some cases—particularly but not exclusively in nonprofit corporations—these obligations may also include commitments external to the organization, such as those relating to preservation of the environment or human rights. To some degree, the ability of these expectations to constrain behavior will depend on the related good governance principles relating to enforcement capacity. Even when legal or other external enforcement is limited, however, establishing clear expectations like care, loyalty and representation enables individuals with governance roles to self-regulate, and can generate social norms of compliance within and among governing bodies.

### b. Mission & Duties in the CCWG Recommendations

The CCWG Recommendations comply with good governance principles by providing adequate guidance to its key actors. The proposals in Recommendations 5 and 6 speak to mission directly. If adopted, they would stake out a limited mission for ICANN: “to coordinat[e] the development and implementation of policies that are designed to ensure the stable and secure operation” of the Internet “and to facilitate its openness, interoperability, resilience and/or security.”<sup>7</sup> They would clarify its commitments to benefit the Internet community, comply with applicable law, operate fairly and transparently, avoid capture, and respect human rights.<sup>8</sup> Enshrining its mission, commitments, and core values as Fundamental Bylaws<sup>9</sup> gives all actors clear and stable guidance on the expectations for their actions on behalf of ICANN.

Much of the CCWG Recommendations addresses the roles and processes by which organizational actions will be taken. It develops an innovative and complex framework, and the construct of the Empowered Community sits at its core. Although ICANN will continue to be run by a board of directors selected through a combination of nominations from its Nominating

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<sup>7</sup> CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Feb. 23, 2016, Recommendation 5 at 26 [hereinafter individual Recommendations are referenced as “Recommendation” followed by the specific Recommendation number]. Additionally, Recommendation 9 would add a series of commitments drawn from the NTIA and ICANN Affirmation of Commitments to the ICANN Bylaws, providing even greater guidance to fiduciaries and others with a role in ICANN governance.

<sup>8</sup> In addition to the human rights component of ICANN’s revised mission statement, Recommendation 12 would require ICANN “to develop a Framework of Interpretation for ICANN’s Human Rights commitment.” This effort would provide additional guidance on this important part of ICANN’s mission.

<sup>9</sup> See Recommendation 3 at 21. (Designating all ICANN Bylaws as either Fundamental Bylaws or Standard Bylaws, the latter of which would be considerably easier to alter. Fundamental Bylaws could be changed only by approval of both the ICANN board and the Empowered Community, and include the bylaws that create the Empowered Community, and its powers and enforcement tools. The Fundamental Bylaw designation would further stabilize ICANN governance by preventing unilateral changes to its fundamental components.).

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Committee (NomCom) and appointments by its Supporting Organizations (SOs) and Advisory Committees (ACs), the new Empowered Community is granted powerful authority to hold the Board to account. Under Recommendations 2 and 4, the Empowered Community, to be made up of SOs and ACs that opt to participate, is granted the right to take seven significant actions. It may:

1. Reject an ICANN budget, strategic plan, or operating plan
2. Approve a change to the Fundamental Bylaws or articles of incorporation, or a sale of all, or substantially all, ICANN assets
3. Reject a change to the Standard Bylaws
4. Remove an individual director, whether that director was nominated by an SO or AC, or by the ICANN Nominating Committee
5. Recall the entire ICANN Board
6. Initiate a binding Independent Review Process (IRP) or request for reconsideration of a board decision
7. Reject an ICANN board decision related to reviews of the IANA functions.

Each of these extraordinary actions can only be taken if the SOs and ACs are in considerable consensus about the need for action (individual levels of consensus are designated for each power) and only after an exhaustive escalation process.

While few organizations would find such an extremely complex framework attractive, it is well-suited to the unique nature of ICANN. The roles and processes identified by the CCWG Recommendations are not simple, but they are clear, and should provide for orderly decision-making processes at the Empowered Community level. The proposal contemplates that governance processes at the SO and AC level will be reviewed and enhanced in Work Stream 2. This task is important, as the internal operations of these constituent parties will greatly impact the Empowered Community's ability to function effectively and accountably.

Finally, the CCWG Recommendations establish constraints that limit key actors' ability to undermine or oppose the best interests of an organization and its stakeholders. As a California nonprofit corporation, each ICANN director is subject to fiduciary duties of care and loyalty. The California statute requires that:

“[a] director shall perform the duties of a director ... in good faith, in a manner that the director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”<sup>10</sup>

Recommendation 5 recommends bylaw language signaling the overarching constraint of mission, requiring ICANN to “act strictly in accordance with, and only as reasonably appropriate, to achieve its Mission.”<sup>11</sup> This Mission, in turn, clearly identifies the obligation to comply with local and international law.<sup>12</sup> In addition, the design of the Empowered Community

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<sup>10</sup> Calif. Corp. Code § 5231(a).

<sup>11</sup> Recommendation 5 at 28.

<sup>12</sup> See Recommendation 5 at 29.

construct reinforces the obligation of representation. It is empowered only to translate the decisions of participating SOs and ACs into action, and has no authority to act beyond their direction. This design will constrain the Empowered Community's ability to veer from its representational commitments.

## B. Auditing & Transparency

### a. Framework Overview

It is very difficult for stakeholders, shareholders, or board members to hold an organization accountable if its actions and reasoning are opaque, secretive, or enigmatic. For that reason, good governance principles place a significant emphasis on mechanisms that compel the organization to open its key records and documents for those entitled to review the actions of the organization. This authority generally encompasses both organizational, financial, and governance records. Good governance principles create an affirmative right on the part of board members and other key stakeholders to access these records. Moreover, good governance principles necessitate that these records be intelligible and actionable. Simply having access to records is insufficient without the ability to pose questions about the decisions they reflect to the executives and officers responsible for their production. Thus, good governance principles provide opportunities for boards and stakeholders to question organization officials in order to provide meaning and context to organizational records.

In some cases, organizational records may be insufficient to identify failings or malfeasance, particularly when the records are incomplete or falsified. Under such circumstances, the discovery of such behavior may hinge upon either external, independent assessments or on internal whistleblowers. Thus, good governance principles call for periodic external reviews of organizational practices and behavior. Similarly, good governance principles require mechanisms that protect whistleblowers who help bring to light organizational failings. Whistleblower protections cannot be *carte blanche* to disclose organizational secrets without cause, but should create an environment that enables employees to act in good faith to preserve the integrity of the organization without risk of retribution.

Effective accountability often requires more than knowledge of the current quarter or fiscal year; understanding historical decisions and why they were made can be critical for both understanding current organizational issues and ensuring fulfillment of past commitments. Good governance principles call for maintenance of historical records in order to preserve institutional knowledge. This becomes even more important in multistakeholder organizations, in which stakeholder groups or representatives may engage or disengage in proportion to their stake in any particular topic. When organizations cannot rely on the presence of a shared base of knowledge among a stable set of participants, maintaining institutional history is critical.

### b. Auditing & Transparency in the CCWG Recommendations

The CCWG Recommendations largely comply with good governance principles that relate to auditing and transparency. In particular, the Recommendations demonstrate a commitment to making financial and governance materials available, allowing for participants to question

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executives and the Board, and imposing regular audits and reviews. However, although the Recommendations recognize the importance of enhancing ICANN's document disclosure policies, whistleblower protections, and accountability reviews of SOs and ACs, the Recommendations propose fully addressing those matters in an ongoing work stream.

The CCWG Recommendations, if fully implemented, would ensure that the participants in the accountability mechanisms would have access to ICANN's key financial and governance records. Recommendation 1 would amend the bylaws to grant to any participant in the Empowered Community a right under California law to inspect "the accounting books and records and minutes of proceedings."<sup>13</sup> Similarly, Recommendation 8 would require that the Board publicly post recordings and transcripts of debates over requests for reconsideration of Board decisions.

The CCWG Recommendations also reflect a strong commitment to public consultation and dialogue throughout ICANN's processes, enabling participants to pose questions to ICANN executives and Board members. At the core of these commitments is use of public consultations and public forums within the various escalation mechanisms in Recommendations 1 and 2. Under Recommendation 2, the Board will be required to "undertake an extensive engagement process" before taking any number of steps, including approving the operating budget, modifying the bylaws, or any Board decisions relating to a review of the IANA functions.<sup>14</sup> Similarly, the public forums required in the escalation process are intended to provide an opportunity for "the ICANN Board and the Empowered Community [to] resolve their issues"<sup>15</sup> through dialogue before escalating further to the use of Community Powers. And Recommendation 4 requires that an interim board "consult with the community through the SO and AC leaderships before making major decisions."<sup>16</sup> In many ways, these recommendations are intended to strengthen multistakeholder processes that ICANN already follows, and Recommendation 5 elevates those multistakeholder processes to that of a "Core Value" of ICANN.<sup>17</sup>

The CCWG Recommendations also include numerous commitments to auditing and periodic review. For example, Recommendation 1 enables participants in the Empowered Community to compel ICANN to hire an independent auditor to investigate issues of potential fraud or gross mismanagement of ICANN resources. Recommendation 9 would require numerous periodic reviews (albeit not necessarily independent) including: accountability and transparency;<sup>18</sup>

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<sup>13</sup> See Calif. Corp. Code § 6333 ("The accounting books and records and minutes of proceedings of the members and the board and committees of the board shall be open to inspection upon the written demand on the corporation of any member at any reasonable time, for a purpose reasonably related to such person's interests as a member.").

<sup>14</sup> Recommendation 2 at 15. Recommendation 3 has a similar requirement of consultation before any changes to the Bylaws.

<sup>15</sup> Recommendation 2 at 17.

<sup>16</sup> Recommendation 4 at 25.

<sup>17</sup> Recommendation 5 at 27.

<sup>18</sup> See Annex 9 at 11.

security, stability, and resiliency;<sup>19</sup> competition, consumer trust, and consumer choice;<sup>20</sup> effectiveness of the WHOIS directory service;<sup>21</sup> and IANA functions.<sup>22</sup>

Although the CCWG Recommendations demonstrate a strong commitment to auditing and transparency, in some narrow areas the Recommendations commit only to improving accountability in the future. In particular, Recommendations 8 and 12 commit to improving ICANN's document disclosure policies, and Recommendation 12 commits both to improving the whistleblowing policy, and to conducting a future review of SO and AC accountability. Of all of these future commitments, the latter appears to be the most important, given the importance of the SOs and ACs in the Empowered Community. Weaknesses in the accountability of the SOs' and ACs' own accountability mechanisms could potentially weaken the effectiveness of the Empowered Community as a whole.

### C. Deliberative Frameworks

#### a. Framework Overview

An important component of each of the above categories of good governance principles is the ability of participants to have the foundational knowledge necessary to activate the available accountability mechanisms. One element of this, already discussed, is that good governance systems require that organizations be transparent about a variety of aspects of the organization. But good governance systems go beyond this, and enable not just the opportunity to access material, but also the resources necessary to engage and deliberate meaningfully within the accountability systems. One piece of this is the availability of materials in formats that are accessible without burdensome levels of expertise; every member of the governance system should have an equal opportunity to support the accountability of the organization without requiring specialized knowledge or expertise. Similarly, resources should be made available to enable effective engagement in the governance system, including financial, educational, and legal resources.

Good governance systems also provide numerous opportunities and paths for engagement and participation in the governance system. In some cases, this requires subsidizing or fully funding the travel of participants to support attendance of meetings and full engagement in the governance system. In other cases, this may involve relying upon a variety of remote participation tools, ranging from conference call lines to video chat, participation hubs, and collaborative drafting tools. Such tools enable the participation of those who would otherwise be unable to fully participate in the deliberative and accountability process, and in turn ensure a more diverse and representative governance system.

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<sup>19</sup> See Annex 9 at 12.

<sup>20</sup> See Annex 9 at 13.

<sup>21</sup> See Annex 9 at 14.

<sup>22</sup> See Annex 9 at 15.

b. Deliberative Frameworks in the CCWG Recommendations

The CCWG Recommendations reflect a general commitment to ensuring that participants have the ability to support and engage in the governance system. For example, Recommendation 5 outlines a series of Core Values (to be enshrined in the difficult-to-change Fundamental Bylaws), and classifies some of these as “Commitments,” which are values that are fundamental to ICANN’s operation, and are intended to apply consistently and comprehensively.”<sup>23</sup> One of these new Commitments is that ICANN use processes that “ensure that those entities most affected can assist in the policy development process.”<sup>24</sup> Similarly, Recommendation 5 also establishes as a Core Value: “Seeking and supporting broad, informed participation reflecting the functional geographic and cultural diversity of the Internet at all levels of policy development and decision-making.”<sup>25</sup> Enshrining these values within the Fundamental Bylaws will help ensure that ICANN continues and enhances its efforts to help participants fully engage in its governance system.

The CCWG Recommendations operationalize these commitments in a few important ways. For example, under Recommendation 7, ICANN must bear the administrative costs of running the Independent Review Panel (IRP) to ensure that it is available as needed. More importantly, when the Empowered Community invokes its power to bring an IRP against ICANN, ICANN must pay the Community’s legal fees, ensuring that cost will never prevent the Community from exercising this accountability mechanism. Additionally, the same recommendation requires ICANN to provide translation services during IRPs so that claimants can fully participate regardless of geography and language.

Because of the significant resources—both financial and time—that are required in order to travel to meetings around the world, opportunities for remote participation can be an important mechanism for ensuring that all participants can engage in accountability processes. ICANN has historically offered opportunities for remote participation, and the CCWG Recommendations would require ICANN to further enhance this commitment, particularly for the Community Forums that are a central component of the escalation process. As is repeated several times in the CCWG Recommendations: “It is expected that for most powers, this will only involve remote participation methods such as teleconferences and Adobe Connect-type meetings over a period of one or two days at most. Unless the timing allows participants to meet at a regularly scheduled ICANN meeting, there is no expectation that participants will meet face-to-face. The one exception to this is the power to recall the entire Board, which would require a face-to-face meeting.”<sup>26</sup>

Overall, the CCWG Recommendations reflect a commitment to ensuring that all participants can effectively engage within the ICANN governance system. In several cases, however, the exact mechanisms for accomplishing this are left unstated. Although it would be helpful to see how ICANN intends to honor these commitments, because they are embodied within the mission and Core Values of the organizations, the expert panel believes there is little risk of ICANN failing to

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<sup>23</sup> Recommendation 5 at 27.

<sup>24</sup> Recommendation 5 at 30.

<sup>25</sup> Recommendation 5 at 30.

<sup>26</sup> Annex 2 at 8; *see also* Annex 4 at 8, 13, and 17.

uphold them. Additionally, Recommendation 7 encourages, but does not require, ICANN to provide pro-bono representation to lesser-resourced participants, and it would further strengthen accountability to see ICANN embrace this suggestion.

#### D. Checks & Balances

##### a. Framework Overview

Clear mission and duties, transparency, and opportunity for deliberation and participation all serve to ensure that participants have sufficient knowledge of organizational actions necessary to catch lapses, malfeasance, and deviations from the mission. But equally important is the ability to act on this knowledge and remedy problems that arise. This ability takes two forms in good governance systems: (1) sets of checks and balances that ensure governance systems are protected (discussed in this subsection), and (2) tools for participants to address accountability issues (discussed in the following subsection).

Mechanisms that allow for unilateral action can facilitate both organizational capture and the elimination of minority rights. Therefore, good governance principles call for systems of checks and balances that serve as a brake on organizational action in the absence of institutional cooperation across a diversity of perspectives. Preventing capture and preserving minority rights are important goals in any organization, but the emphasis will vary depending on the needs of the entity. Checks and balances assure accountability and consensus at the expense of efficiency. Accordingly, corporations and nonprofits may use checks and balances more sparingly in order to carefully balance the accountability benefits against a need for efficiency. By contrast, multistakeholder organizations often serve quasi-regulatory functions, wherein assuring accountability is worth risking deadlock or inefficiency, and therefore they will rely more heavily on checks and balances to preserve accountability.

Under good governance principles, there are three interrelated components of an effective system of checks and balances, as it relates to accountability. First, accountability mechanisms should be independent of the day-to-day operations of the organization and independent of any one set of stakeholders. Second, there should be a diversity of stakeholders and perspectives who can activate these accountability mechanisms. And third, mechanisms should be in place to ensure that those stakeholders are free from conflicts of interests. Taken together, these three components ensure accountability mechanisms are activated only when a diverse set of stakeholders, representing a diverse set of views, agree and act in concert.

As noted previously, participating in accountability systems often requires resources: financial resources to cover personnel, travel, and legal counsel, time to monitor organizational behavior and review documents, and human resources to participate in organizational activities. Thus resource constraints can undermine the effectiveness of checks and balances, as well-resourced participants can sometimes play an outsized role, unbalancing accountability mechanisms. For that reason, good governance principles also make resources available to prevent the less privileged in an organization from being overwhelmed by those with more. One of the most important of these resources is legal counsel. This is particularly true in multistakeholder organizations, in which participants are more likely to come from diverse backgrounds and

communities, including technical or international communities that may have little experience in legal and policy matters in a given jurisdiction.

b. Checks & Balances in CCWG Recommendations

The CCWG Recommendations embody several checks and balances that aim to prevent capture and preserve minority rights. Importantly, these numerous accountability mechanisms exist outside of ICANN's day-to-day operation, enabling any coalition of participants to activate these tools. At the core of these mechanisms is the Empowered Community and the Community Powers. As Recommendation 2 outlines, any coalition of SOs and ACs can call for a Community Forum or vote to exercise a Community Power, so long as the thresholds are met and there is no more than a single objection. For example, to recall the entire Board, any three SOs and ACs must call for a Community Forum to discuss recalling the Board, and any four SOs and ACs must agree to exercise the power to recall. Similar independence exists for initiating an IRP or seeking Board reconsideration, where flexible rules allow an even wider variety of stakeholders to activate the accountability mechanisms.<sup>27</sup> Moreover, Recommendation 7 ensures that the Empowered Community can effectively use the IRP process by directing ICANN to cover the legal fees of the Community in such circumstances. Critically, Recommendations 1 and 3 would preserve the independence of these accountability mechanisms by making their rules part of the difficult-to-change Fundamental Bylaws.

The checks and balances of the CCWG Recommendations are bolstered by the diversity of participants that must agree to exercise the Community Powers. As noted above, to call for Community Forums and exercise Community Powers, anywhere from two to four SOs and ACs must reach consensus. The SOs and ACs represent different constituencies, selected in different ways, often reflecting geographic diversity. Additionally, the remit of each SO and AC varies, with some having more technical orientations, and others are focused on specific policy development areas.

There is also considerable diversity within each of the SOs and ACs.<sup>28</sup> For example, The Generic Names Supporting Organization (GNSO) has members that span businesses and civil society groups.<sup>29</sup> By comparison, the members of the Address Names Supporting Organization (ASO) come from five geographically diverse regional organizations, each with their own independent membership and selection process.<sup>30</sup> The Asia Pacific Network Information Centre (APNIC), for example, has three seats in the ASO—one selected by the Executive Council of the regional organization, and two selected through an election open to all APNIC members (and monitored

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<sup>27</sup> See Recommendation 7 at 34 (“Any person/group/entity ‘materially affected’ by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress.”).

<sup>28</sup> For further discussion of the diversity of the SOs and ACs, *see infra* Part III.C.a.

<sup>29</sup> The GNSO membership is quite varied, included constituency groups of commercial, non-commercial, registry, and registrar stakeholders. More information about the GNSO structure, and links to the membership lists of each constituency group is available on the GNSO website. *See* GNSO, *Stakeholder Groups and Constituencies* (last updated Oct. 3, 2013), <http://www.gnso.icann.org/en/about/stakeholders-constituencies>.

<sup>30</sup> *See* ASO Address Council Elections, <https://aso.icann.org/advisory-council/address-council-elections/>.

by independent observers).<sup>31</sup> Thus, the exercise of any Community Powers represents consensus among a diversity of expertise, geography, and perspective.

A third aspect of the checks and balances in the CCWG Recommendation is the protection against conflicts of interest. The Recommendations place the greatest emphasis on ensuring that the Empowered Community remains free from conflict when monitoring the Board's response to governmental advice provided through the Governmental Advisory Committee (GAC). Any SO or AC can provide advice to the Board, but advice from the GAC poses unique accountability risks because it is more difficult for the Board to reject GAC advice that is made without objection.<sup>32</sup> Because it is more difficult for the Board to oppose GAC advice, the Empowered Community becomes a more important check on ICANN in this context. Generally, the GAC could, if it elected to, be a decisional participant in the Empowered Community, which would raise a potential situation in which the Board follows GAC advice and the GAC votes against the exercise of Community Powers to block the Board decision. Recommendations, 1, 2, and 11 all respond to this potential for conflict with the "GAC carve out." This provision blocks the GAC from "participat[ing] as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice."<sup>33</sup> Additional protections against conflicts of interest include the use of independent audits,<sup>34</sup> IRPs with independent, neutral arbitrators,<sup>35</sup> and a commitment to neutral, fair, and non-discriminatory processes.<sup>36</sup>

Taken together, all of these checks and balances serve to protect minority rights. For example, the Board must give special consideration to consensus GAC advice, but under Recommendation 11, a single country's objection is sufficient to eliminate this special consideration. Under Recommendation 2, two objections from SOs and ACs are sufficient to block exercise of a Community Power. And Recommendation 6 makes preservation of human rights a Core Value, an obligation that will be enforceable through the IRP if and when ICANN develops a Framework of Interpretation on Human Rights.

The checks and balances will almost certainly serve as a drag on ICANN's overall efficiency, but that appears to be a conscious choice in order to emphasize deliberation, encourage consensus, and preserve accountability. At the same time, the mechanisms also have fail-safe mechanisms to ensure that they cannot be used to paralyze ICANN. For example, the exercise of the Community Powers can neither be initiated nor blocked by a single SO or AC.<sup>37</sup> Similarly, although the CCWG Recommendations make it easier to initiate IRPs or ask the Board for reconsideration, which creates a risk that a single entity could attempt to block policies or decisions, "proposed

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<sup>31</sup> See APNIC NRO NC Election Procedures, <https://www.apnic.net/community/participate/elections/nro-elections/nro-election-process>.

<sup>32</sup> See Recommendation 11 (noting that the Board requires 60% of its members to vote to reject GAC advice submitted without objection, but only a majority to reject non-consensus advice).

<sup>33</sup> Recommendation 1 at 14.

<sup>34</sup> See Recommendation 1 at 13.

<sup>35</sup> See Recommendation 7 at 35.

<sup>36</sup> See Recommendation 5 at 27.

<sup>37</sup> See Annex 15 at 22.

Reconsideration and IRP enhancements include the ability to dismiss frivolous or abusive claims and to limit the duration of proceedings.”<sup>38</sup>

## E. Enforcement Capacity

### a. Framework Overview

Once the participants have determined that accountability issues need to be addressed, good governance systems provide mechanisms for response. At such times of organizational conflict, ambiguity in processes can inject unnecessary risk or confusion. For that reason, good governance systems have clearly defined mechanisms in place well before they are needed. Given that governance systems are often most needed when the routine operations of the organization have stalled or been compromised, these extraordinary accountability measures must be clear, robust, and resilient so that they can be activated without provoking unnecessary questions about the legitimacy of the mechanisms themselves. While such questions may be impossible to avoid, good governance systems reduce their effect by relying upon clearly defined processes.

One example of clearly defined processes important for activating accountability measures is the use of voting. In many organizations, particularly multistakeholder organizations, consensus is the preferred means of decision-making. However, in times of organizational conflict, consensus may be unobtainable. Good governance systems provide for flexible decision-making mechanisms that can adapt as the situation escalates. Where consensus proves unobtainable, good governance systems may offer a fallback to voting, and provide clear thresholds and caps that establish the precise standards under which decisions are made.

Finally, good governance systems provide participants the ability to go beyond the internal processes of the organization and seek external intervention when necessary. In particularly challenging circumstances, the internal processes of an organization may be insufficient to address accountability issues. At such times, participants need an independent, legitimate recourse as a last resort. Good governance systems subject the organization to clearly established, stable, and legitimate legal authority that provides for cognizable rights whose violation can be redressed, and ensure access to courts or independent court-like bodies to adjudicate these rights.

### b. Enforcement Capacity in the CCWG Recommendations

The CCWG Recommendations meet good governance practices for providing clearly defined and detailed processes for enforcing accountability. Indeed, a substantial portion of the Recommendations are exactly that: detailed descriptions of the mechanisms by which participants can engage in and activate a variety of accountability mechanisms. Perhaps the most important and detailed descriptions relate the Community Powers and the rules under which such powers can be activated. Recommendations 1 and 4 in particular spell out these Community Powers and the process of escalation that culminates in the use of the Community Powers to take actions such as approving changes to Fundamental Bylaws, removing a Board Director, or

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<sup>38</sup> Annex 15 at 22.

recalling the entire Board. Further details on the processes are provided in the Annexes. For example, Annex 7, explains in detail how SOs and ACs can begin to activate an IRP, and explain the method by which a “Chairs Council” will take the ministerial steps necessary to pursue an IRP. Thus, the CCWG Recommendations describe a robust framework that will provide clear direction in moments of potential conflict.

Clearly defined enforcement mechanisms explicitly and carefully address the processes by which decisions are made. The CCWG Recommendations emphasize consensus, but the Recommendations also provide clear rules for voting when consensus is unobtainable. For example, a key stage in the escalation mechanisms in Recommendation 2 is the use of Community Forums, open “for any interested stakeholder in the community to participate.”<sup>39</sup> These forums provide an opportunity for the ICANN Board and the Empowered Community to resolve disputes through dialogue and consensus. However, recognizing that consensus may not always be possible, Recommendation 2 provides detailed descriptions of the exact number of votes that each Community Power requires in order for the Empowered Community to activate it. Similarly, although ICANN must give special consideration to consensus GAC advice, Recommendation 11 is clear that 60% of the ICANN Board can vote to reject such advice. Consensus is an important part of the CCWG Recommendations, but the Recommendations do not rely exclusively on it, and instead provide accountability mechanisms that can be exercised in the absence of consensus.

Finally, the CCWG Recommendations provide clear mechanisms for participants to obtain external intervention, in the form of court orders, if the internal accountability mechanisms prove inadequate. Recommendation 1 establishes the Empowered Community as a Sole Designator, which is a California unincorporated association with certain legal rights, including standing. For example, the Empowered Community can initiate a binding IRP; if the ICANN Board refuses to follow a panel decision, the Empowered Community could enforce that decision in any court recognizing international arbitration results, including both the United States and other countries.<sup>40</sup> Similarly, if the ICANN Board refuses to comply with an Empowered Community decision to remove an individual ICANN Director or the entire Board, the Community can immediately bring a claim in a court with jurisdiction. An important safeguard to these legal rights is that the proposed bylaws bar ICANN from challenging the standing of the Empowered Community in the exercise of these legal rights.<sup>41</sup>

### **III. Overall Observations on the CCWG Recommendations**

In the above section, the expert panel evaluated the extent to which the CCWG Recommendations meet good governance practices in each of the five broad categories of the good governance framework. However, the principles of the framework represent a constellation of responsibilities, duties, and tools that operate in concert to create a system of good governance. As such, although it is important that the CCWG Recommendations meet the good

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<sup>39</sup> Recommendation 2 at 16.

<sup>40</sup> See Recommendation 2 at 16; Annex 7 at 11.

<sup>41</sup> See ICANN Proposed Bylaws, at §§ 4.3(b)(i)(A), 4.3(b)(i)(B), 4.3(f), <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>.

governance practices within each category, it is equally important that they operate as a collective whole—across categories—to create a network of accountability safeguards. Although the expert panel cannot look at every such circumstance that might necessitate the activation of the accountability mechanisms, we consider below one particularly illustrative example: how the CCWG Recommendations could mitigate the risk of a takeover of ICANN by governments or other third-parties. This example demonstrates how the CCWG Recommendations together are consistent with sound principles of good governance that lessen the risk of such a threat to ICANN’s accountability. Although it is but one example, the expert panel believes that the good governance practices reflected in the CCWG Recommendations will aid in preserving ICANN’s accountability from other potential challenges as well.

### A. Mitigating the Risk of ICANN Capture

From early in the transition process, NTIA has made clear that it would not accept a proposal that could lead to a single government (or a coalition of governments) replacing its oversight role. NTIA’s position is entirely logical because domination of ICANN by a single government (or coalition of several governments) could jeopardize one or more of the four core criteria that NTIA has emphasized must be satisfied.<sup>42</sup> Nonetheless, some commentators have expressed fear that, in the absence of NTIA’s supervision, some foreign government, or a small group of them, would come to dominate ICANN, with resulting loss to its openness and security.<sup>43</sup> Although such fears are understandable, we find them to be largely without foundation. In this section, we undertake a realistic appraisal of ICANN’s exposure to a takeover after the proposed transition. This inquiry is necessarily incident to our appraisal of the proposed corporate governance structure for ICANN, because a governance structure that is unstable and exposes ICANN to a sudden takeover can hardly be considered optimal. Our appraisal is necessarily provisional, as important aspects of the transition remain to be determined at the Work Stream 2 stage. Still, at least, on the conceptual level, we consider the prospects to be extremely remote for a takeover of ICANN by any of (a) a single government, (b) a group of governments, or (c) one or more economic actors.

### B. The Takeover Risk: A Conceptual Overview

In the case of public corporations, takeovers, whether effected by a hostile tender offer or a proxy context, do occur—but they have been infrequent in recent years, probably because of a variety of defensive measures that public corporations commonly today use. ICANN is, of course, very differently situated from a public corporation. The key difference is not that ICANN lacks shareholders. After all, the five Decisional Participants in the Empowered Community will have voting rights and could in principle replace the entire ICANN board. Rather, the most important difference is that the preferences of shareholders in a public corporation are highly homogeneous, while the preferences of ICANN’s major stakeholders (i.e., its Decisional Participants) are predictably heterogeneous. That is, stockholders in a public corporation

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<sup>42</sup> We take it to require no elaboration that a government-dominated ICANN would by definition be inconsistent with (1) “supporting and enhancing” the multistakeholder mode; (2) maintaining “the security, stability, and resiliency of the Internet domain name system”; (3) meeting “the needs and expectations of the global customers and partners of the IANA services”; or (4) maintaining “the openness of the Internet.”

<sup>43</sup> See, for example, L. Gordon Crovitz, “Stop Obama’s Internet Giveaway,” *The Wall Street Journal*, March 20, 2016 (op/ed article predicting increased governmental role and likely dominance of China from proposed transition).

basically want to maximize their share value. Thus, if a bidder makes a tender offer at a substantial premium over the current market price, they are likely to accept that offer and tender their shares. The only area of real disagreement is likely to be whether they can hold out for an even higher premium.

In contrast, the stakeholders in ICANN have very heterogeneous preferences. The various SOs and ACs that are the vote-holding Decisional Participants in the Empowered Community have different constituencies and orientations. Some are basically comprised of private commercial users of the Internet, whereas others have a more scientific orientation or deep-rooted commitment to preserving the openness of the Internet. Some are more interested in ICANN's Domain Name Policy, while another may care more about its IANA functions. Also, most are geographically dispersed, making it less likely that a single country or outside actor could dominate them. In addition, diversity and regional requirements require at least one board member of ICANN to come from each of the five geographic regions, and no more than five members may come from any one region. Government officials and similar representatives are also barred from serving as ICANN members. All of this is in sharp contrast to the patterns of shareholder ownership in a public corporation, where a substantial majority of the shares will be held by similarly situated institutional investors and where sometimes a majority of the stock may be controlled by a small number of hedge funds and other investors located in the same city or region. This greater dispersion and diversity within ICANN's shareholders implies greater insulation from a takeover.

All in all, because the Decisional Participants do not share the same orientation or interests, there is a much less possibility that a government or other third party could convince them effectively to cede control.

### C. Strategies for a Takeover

Notwithstanding this point that ICANN is accountable to stakeholders having far more diverse preferences than the shareholders in the typical public corporation, it is still necessary to walk through the various tactics by which a government or other third party could attempt to acquire control. Three basic scenarios will be considered:

#### a. Ousting the Board

The simplest means by which to effect a takeover is to oust the board, replacing the incumbent directors with the insurgent's candidates. In the case of ICANN, this is easier said than done. Although the Empowered Community will have the legal right and power to remove the entire ICANN, this requires a number of time-consuming procedural steps to be taken along a gradual continuum of escalation. Ultimately, at the end of this process, an extraordinary supermajority of the Decisional Participants must vote in favor of removal. More specifically, it now appears that there will be five "Decisional Participants"—three SOs and two ACs. Of these, four must support and no more than one may object to the replacement of the board.\*

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\*It appears to be still uncertain whether the GAC will exercise voting power.

Beyond this initial point that a high supermajority is required (and that any two Participants can veto), a further reinforcing point needs to be made: these Decisional Participants are both geographically dispersed and economically diverse. The three SOs are: (1) the Generic Names Supporting Organization (GNSO); (2) the Country Code Names Supporting Organization (ccNSO), and (3) the Address Names Supporting Organization (ASO). GNSO's members consist of both business users and customers, Intellectual Property interests, and civil society groups. Among its members are well-known large corporations, such as AT&T, Microsoft, Facebook, Pfizer, Verizon and General Electric. It seems fairly evident that such users are not likely to be dominated by a single government or to be willing to sacrifice their long-term interests in the Internet for any economic benefit. CcNSO, the second SO, is populated by various registries (its members include Neustar, Nominet, AFNIC, DNIC and SIDN). The Third SO—ASO—consists of the five Regional Internet Registries (ARIN, APNIC, LANIC, RIPENCC, and AFRINIC). All three SOs are thus geographically diverse, such that no single country (or even a coalition of them) could foreseeably dominate the three SOs.

The two ACs are: (1) the Governmental Advisory Committee (GAC), and (2) the At-Large Advisory Committee (ALAC). The GAC has 110 governments plus 35 observers. Its members include the US, the UK, China, Russia, Brazil, etc. It is as likely that a single country (or a small group) could dominate the GAC as a single country (or a small group) could dominate the United Nations. The ALAC is intended to represent the voice of Internet users, and its members include academics, consumer advocates, and civil societies. Again, the diversity of their interests and views is obvious, and they are unlikely to be influenced by the same economic considerations as may motivate other groups.

In short, power within the Empowered Community is highly fragmented, and the prospect seems remote that a single country (or coalition) could dominate or “capture” four out of five of these bodies.

#### b. Capturing the Nominating Committee

An alternative means of gaining control over ICANN might be to capture its Nominating Committee (NomCom). But the NomCom actually holds less power than its name appears to indicate. It selects only eight of the 16 members of ICANN's voting board. Of the other eight, two are selected by the GNSO; two by the ccNSO; two by the ASO, and the ALAC selects one. The final director is ICANN's CEO. Moreover, ICANN's directors serve a three-year term, so that each year the NomCom is selecting no more than three directors.

This means that ICANN has effectively a “staggered board,” which device has long been recognized as a relatively impregnable barrier to a hostile takeover in the case of public corporations.<sup>44</sup> Moreover, even if the NomCom were somehow “captured” by an insurgent group, it would take three elections before it could elect even 50% of the board. In reality, this implies that ICANN has in effect a unique governance structure that combines both a staggered board and a classified board (with four different classes electing 50% of its board and the NomCom selecting the rest on a staggered basis). In the case of a public corporation, such a

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<sup>44</sup> See, e.g., Lucian Bebchuk, et al., The Powerful Antitakeover Force of a Staggered Board: Theory, Evidence & Policy, 54 Stan. L. Rev. 887 (2002).

combination would be so effectively insulated from a takeover to make any challenge virtually unthinkable. Moreover, if any slow takeover of the NomCom were mounted by an outsider, the Empowered Community could respond by removing those ICANN directors so elected who were perceived to have been captured, using the procedures next discussed.

c. “Capture” Through Corruption.

Recent events have shown that international organizations (especially those in the field of international sports) can be “captured” through corruption. Leading officials of such organizations have pleaded guilty to (or have been indicted for) accepting bribes to determine the location of international sporting events (such as the location of soccer’s World’s Cup). Correspondingly, it is at least imaginable that a government or a private actor could bribe the board of ICANN to vote the way it wishes on some hypothetical critical decision. Of course, this would have also been possible even under the existing structure of ICANN, as NTIA did not have any investigative machinery dedicated to detecting instances of bribery or corruption.

Still, if corruption is a potential threat, it must also be recognized that the Empowered Community has ample checks and balances to protect itself. For example, if one or two (or even a greater number of) ICANN directors appeared to be acting in the interest of some outside entity or country), a simple majority of the Decisional Participants could remove them (provided that no more than one Decisional Participant objected). Alternatively, the Empowered Community could reverse the actual decision by initiating a binding IRP by a simple majority vote of the Decisional Participants. Mediation could also be required.

The bottom line is that the stakeholders in the Empowered Community have far more rights and powers than do the members of the typical not-for-profit corporation. These powers can be brought to bear if decisions appear to have been made that are not in the best interests of ICANN or the Empowered Community. Thus, in our view, a hostile takeover remains no more than a very remote possibility (albeit one that should be kept in mind during the Work Stream 2 process).

#### **IV. Conclusion**

The expert panel, drawing on frameworks and leading scholarship from across the fields of corporate, nonprofit, and multistakeholder governance, created a framework of good governance principles by which to evaluate the CCWG Recommendations. Applying that framework, both within five broad categories of principles, and as whole, the expert panel concludes that the CCWG Recommendations are generally consistent with sound principles of good governance. ICANN has a unique and important mission within the Internet ecosystem, and in service of that mission, it has a unique governance structure. The CCWG Recommendations reflect that, and are tailored to enhance the accountability of that structure in ways that address the unique needs of ICANN and its stakeholders.

Throughout the CCWG Recommendations, we see the choice to emphasize consensus and dialogue over expediency and efficiency. The most significant example is the escalation process of the Community Powers, which supplements the day-to-day ICANN processes already replete

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with multistakeholder dialogues. The escalation process provides one further opportunity to reach a consensus solution before turning to more significant measures. While this emphasis on multistakeholder processes, dialogue, and consensus might not be well-suited for companies that prioritize efficiency and profits, or nonprofits that pursue a singular mission on behalf of a single, well-defined constituency, they are well-matched to the special needs and role of ICANN.

This expert assessment has focused on the CCWG Recommendations compliance with a framework of good governance practices. It is the conclusion of this expert panel that both with respect to the broad categories of governance principles and as a whole, the CCWG Recommendations generally follow good governance principles. And importantly, while the Recommendations tilt toward a more ponderous and deliberate pace, they safeguard against paralysis and encourage the continued, stable operation of ICANN and the IANA functions. The expert panel cannot predict the challenges that ICANN may face in the future, but having seen how the CCWG Recommendations create a network of accountability safeguards, we feel confident that the Recommendations, should they be implemented, incorporate strong protections that will contribute to enhancing ICANN accountability.

### Appendix 1: Foundational Scholarship

1. Independent Sector, *Principles for Good Governance and Ethical Practice* (2015)
2. International Non-Governmental Organisations, *INGO Accountability Charter* (2014)
3. American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (2008)
4. American Bar Association, *Corporate Director's Guidebook* (2011)
5. Business Roundtable, *Principles of Corporate Governance* (2012)
6. OECD, *Corporate Governance Principles* (2015)
7. OECD, *Best Practice Principles for the Governance of Regulators* (2014)
8. Financial Reporting Council, *The UK Corporate Governance Code* (2014)
9. Australian Securities Exchange Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003)
10. IGF, *Best Practice Forum on Developing Meaningful Multistakeholder Mechanisms: A Contribution from Members of the Internet Technical Community* (2014)
11. Pins Brown, *Principles that make for effective governance of multi-stakeholder initiatives: updated, final version* (2007)
12. Carmen Malena, *Strategic Partnership: Challenges and Best Practices in the Management and Governance of Multi-Stakeholder Partnerships Involving UN and Civil Society Actors* (2004)
13. Sarah Serizawa, *Review of Best Practices for MSI: Recommendations for GIFT, Chapter 4: Legitimacy and Implementation* (2012)
14. Urs Gasser, et al., *Multistakeholder as Governance Groups: Observations from Case Studies* (2015)
15. Rolf H. Weber & R. Shaw Gunnarson, *A Constitutional Solution for Internet Governance* (2012)
16. Avri Doria, *ICANN Globalization, Accountability, and Transparency* in William Drake & Monroe Price (Eds.), *Beyond NETmundial: The Roadmap for Institutional Improvements to the Global Internet Governance Ecosystem* (2014)
17. Jeanette Hofmann, *Constellations of Trust and Distrust in Internet Governance* (2015)
18. Milton Mueller & Brenden Kuerbis, *Towards Global Internet Governance: How to End U.S. Control of ICANN Without Sacrificing Stability, Freedom or Accountability* (2014)